



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2004

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2004-9836

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213208.

The Austin Police Department (the "department") received a request for "the entire investigative report" on a former assistant chief of police prepared by an outside investigator. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code because it is confidential under section 143.089(g) of the Local Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. We understand that the City of Austin (the "city") is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. *See* Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who

were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).¹ *Abott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.).

All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. *See* Local Gov't Code § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

A qualified civil service municipality may elect under subchapter I of chapter 143 of the Local Government to enter into an agreement with a police association regarding “wages, salaries, rates of pay, hours of work, other terms and conditions of employment, [and] other personnel issues.”² Local Gov't Code § 143.303. When a qualified municipality enters into such an agreement, the agreement “supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, or *other terms and conditions of employment* to the extent of any conflict with the statute” and “preempts any contrary statute, executive order, local ordinance, or rule adopted by the state or a political subdivision or agent of the state including a personnel board, a civil service commission, or a home-rule municipality.” Local Gov't Code § 143.307(a), (b) (emphasis added). However, an agreement “may not diminish or qualify any right, benefit, or privilege of any employee under this chapter or other law” unless the change is approved by a majority of the police association. *See id.* § 143.307(c).

You inform us that in April 2004 the city and the Austin Police Association entered into an agreement pursuant to subchapter I, and that agreement remains in effect. You have provided us with a copy of the agreement. *See* Agreement Between The City of Austin and The Austin Police Association (hereinafter “Agreement”). Article 16 of the Agreement

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

²Subchapter I of the Local Government Code applies in part to municipalities with a population of 460,000 that operates under a city manager form of government. *See* Local Gov't Code § 143.301. The submitted Agreement indicates that the city is such a qualified municipality.

establishes an independent investigation process. *See* Agreement, Art. 16, § 4, p. 37. This section provides in part:

(a) . . . “Independent Investigation” means an administrative investigation or inquiry of alleged or potential misconduct by an officer, authorized by the Chief of Police or City Manager and conducted by a person(s) who is not an employee of the City of Austin; an employee of the Office of the Police Monitor; or a volunteer member of the [Volunteer Citizen] Panel.

Id. § 4(a), p. 37. The Agreement also provides that the “provisions of Section 143.089(g) of the Texas Local Government Code are expressly modified to the extent necessary to permit public release of a final report prepared by an investigator who conducts an Independent Investigation authorized by the Chief of Police or City Manager concerning police conduct.” Agreement, Art. 16, § 5(a), p. 37. Furthermore, the Agreement applies “to any Independent Investigation whether completed prior to or after the effective date of this Agreement and applies to every position and rank within the Austin Police Department.” Agreement, Art. 16, § 5(c), p. 38. *See also* Agreement, Art. 4, §§ 2 and 3, pp.3-4.³ Section 5 continues:

(b) The public release of information authorized by this Section shall not contain or reveal evidentiary facts, or other substantive investigative information from the file, except to the extent that such information is at the time of such release no longer protected from public disclosure by law, or is already public as a matter of fact by lawful or authorized means or by the officer’s own release. For example, the names of officers in an investigation may not be released, but could be released if those officers have elected to enter the public debate and discuss their involvement, or if the public has been informed of identities by lawful or authorized means in the course of grand jury or other legal proceedings. The public statements authorized in this agreement are subject to review by the City of Austin Law Department to insure compliance with this Agreement and to determine whether the release of such information may be prohibited by other law.

. . . .

(d) Section 143.089(g) of the Texas Local Government Code is modified and superceded to the extent necessary to permit the public release of the following information only:

³The independent investigation as issue was completed prior to the enactment of the current Agreement.

(4) A final report from an Independent Investigator, whether or not recommended by the [Volunteer Citizen] Panel. This section shall also apply to any Independent Investigation completed prior to ratification of this agreement.

Agreement, Art. 16, § 5 (b), (d), pp. 37, 38.

You inform us that after the Agreement was signed, the city released the two page final report prepared by the independent investigator in accordance with Art. 16, § 5 of the Agreement. You also inform us that the investigation of the incident “did not result in disciplinary action under Sections 143.051-.055 of the Local Government Code.” You claim, therefore, that the submitted information, consisting of the entire investigative file pertaining to the investigation at issue which you state is part of the department’s file kept for its own use under section 143.089(g), is confidential under section 143.089(g) of the Local Government Code. Thus, we conclude that the city must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.⁴

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

⁴The requestor, citing Open Records Decision No. 677 (2002), asserts that the submitted information is no longer confidential because the city released the final report pertaining to this matter. In Open Records Decision No. 677, this office addressed the scope of the attorney work product privilege under sections 552.103 and 552.111 of the Government Code. As these exceptions are not before us, we need not address the applicability of ORD 677 to the information at issue.

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 213208

Enc. Submitted documents

c: Mr. Jordan Smith
Austin Chronicle
4000 North IH-35
Austin, Texas 78751
(w/o enclosures)